No. 15363

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

MILDRED MARIE YOUNG, individually and DANNY LEE YOUNG, DAVID RAY YOUNG and DANIEL RAY YOUNG, through their guardian *ad litem*, Mildred Marie Young,

Appellants,

vs.

AEROIL PRODUCTS COMPANY INC., a corporation, STRUCTURAL MATERIAL COMPANY, a corporation and DERYL S. YUNDT,

Appellees.

Appeal From the United States District Court for the Southern District of California, Central Division.

APPELLANTS' OPENING BRIEF.

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Statement of Jurisdiction.

It is alleged in the first amended complaint as follows:

(a) The defendant, Aeroil Products Company, Inc., is a citizen of the State of Delaware and was doing business in the State of California [Tr. Vol. I, p. 3, lines 1-5.]

(b) The defendant, Structural Material Company, is a citizen of the State of California. [Tr. Vol. I, p. 2, lines 21-25.]

(c) The defendant, Deryl S. Yundt is a citizen of the State of California. [Tr. Vol. I, p. 3, lines 7 and 8.]

(d) The plaintiffs are all citizens of the State of Texas. [Tr. Vol. I, p. 3, line 14.]

(e) The matter in controversy exceeds, exclusive of interest and costs, the sum of Three Thousand Dollars ($3,000.00). [Tr. Vol. I p. 3, lines 16 and 17.]

(f) The occurrence being the subject of the action took place in Los Angeles County, State of California. [Tr. Vol. I, p. 3, lines 19 and 20.]

These facts were stipulated to being true and became a part of the facts ordered established by the pre-trial order. [Tr. Vol. I pp. 23 and 24.]

The trial court found these jurisdictional facts to be true as a part of the Findings of Fact. [Tr. Vol. I pp. 36 and 37.]

The United States District Court for the Southern District of California Central Division had jurisdiction under U. S. C. A. 28, Section 1332, which reads as follows:

> "Sec. 1332. *Diversity of Citizenship: Amount in controversy.*
>
> "(a) The district Courts shall have original jurisdiction of all civil actions where the matter in controversy exceeds the sum or value of $3000.00 exclusive of interest and costs and is between:
>
> "(1) Citizens of different states."

The United States Court of Appeals for the Ninth Circuit has jurisdiction under the following statutes:

U. S. C. A. Title 28, Section 1291:

> *"Final Decisions of district Courts.* The Courts of Appeals shall have jurisdiction of appeals from

all final decisions of the district courts of the United States . . ."

U. S. C. A. Title 28, Section 1294:

"*Circuits in which decisions reviewable.* Appeals from reviewable decisions of the district and territorial courts shall be taken to the courts of appeal as follows:

"(1) From a district court of the United States to the court of appeals for the circuit embracing the district;"

U. S. C. A. Title 28, Section 2106:

"*Determination.* The Supreme Court or any other court of appellate jurisdiction may affirm, modify, vacate, set aside, reverse any judgment, decree, or order of a court lawfully brought before it for review, and may remand the cause and direct the entry of such appropriate judgment, decree, or order or require such further proceedings to be had as may be just under the circumstances."

U. S. C. A. Title 2107:

"*Time for Appeal to Court of Appeals.* Except as otherwise provided in this section, no appeal shall bring any judgment, order or decree in an action, suit or proceeding of a civil nature before a court of appeals for review unless notice of appeal is filed, within thirty days after the entry of such judgment, order or decree."

In this case the final judgment was entered on July 19, 1956. [Tr. Vol. I, p. 50, lines 16 and 17.] The Notice of Appeal was filed with the District Court on August 8, 1956. [Tr. Vol. I, p. 53, lines 13 and 14.] The Notice of Appeal was filed, therefore, within thirty days after the entry of the final judgment.

U. S. C. A. Title 28, Rules of Civil Procedure, Rule 73(a), second paragraph, first sentence:

> "A party may appeal from a judgment by filing with the district court a Notice of Appeal."

The Statement of Points on Appeal were filed with the District Court on August 8, 1956. [Tr. Vol. I, p. 58, lines 21 and 22.]

Statement of the Case.

Aeroil Products Company, Inc., a corporation, assembled the portable elevator being the subject of this action in Los Angeles, California. Deryl S. Yundt, who was manager of Aeroil Products Company delivered the machine to H. L. Weigert who was the employer of Herbert Weldon Young. [Tr. Vol. I, pp. 24 and 25.] Structural Materials Company was the jobber of the machine in the sale. Sam Mulkey Company, Inc. the manufacturer was never in California and never did business in California. [Tr. Vol. I, p. 22.] The portable elevator was sold by defendants to H. L. Weigert on July 7, 1953. On July 7, 1953, H. L. Weigert was given a copy of Plaintiff's Exhibits 1 through 6, inclusive. The machine referred to in the Exhibits 1 through 6 inclusive is the same as that delivered to H. L. Weigert and the same as the machine referred to in the complaint as the machine that killed Herbert Weldon Young. [Tr. Vol. I, p. 26, lines 6-20.] That on March 3, 1953, Herbert Weldon Young moved the portable elevator away from a roof in the same way he and others had always moved it and the upper end descended and hit the pavement of a level street and then the undercarriage collapsed and Herbert Weldon Young's head was crushed between the tongue and axle of the machine. [Tr. Vol. II, p. 23, lines 22-25; p. 24, lines 1-25; p. 25, lines 1-22.]

The Aeroil Mulkey Portable All-Steel Elevator was negligently designed and constructed and the defect in the machine was inherent and hidden. [Tr. Vol. II, p. 173, lines 19-22; p. 196, lines 14-24.] The articulate member of the undercarriage toward the normally upper end of the conveyor was not constrained against motion toward the normally lower end of the conveyor except insofar as the weight of the conveyor resting upon it. When the normally upper end of the conveyor hit the ground, the articulate members of the undercarriage were not constrained against motion toward the normally lower end (but then the upper end) and because of the energy in the system of the machine caused by the tipping over of the machine the undercarriage collapsed as observed in the accident. [Tr. Vol. II, p. 173, line 24, to p. 197, line 12.] However, the tipping of the normally upper end of the conveyor so that it was down and the normally lower end was up did not injure Mr. Young. This would not have hurt him. It was the collapsing of the undercarriage that killed him. The plates or "riser" on the normally lower end of the machine had nothing to do with the collapse of the undercarriage. [Tr. Vol. II, p. 196, lines 14-24.] At the time of the accident the upper end of the elevator was 20 feet. [Tr. Vol. II, p. 71, lines 12-25; p. 23, lines 1-3.] The elevator was 24 feet with one 8 foot extension, over all length 32 feet. [Tr. Vol. II, p. 46, lines 14-15.] It was warranted that it could be raised to a height of 22 feet. [Pltf. Ex. 6.] Herbert Weldon Young weighed 142 pounds. [Tr. Vol. II, p. 165, lines 13-18.] Mr. Young was 5 feet, 10 inches tall. [Tr. Vol. II, p. 65, lines 17 and 18.] When the upper end of the conveyor is at a height of 20 feet and then the lower end of the machine is raised a vertical distance of 5 feet, 5 inches, it will just balance with

a man of 150 pounds weight holding onto it and exerting his full weight. If it goes beyond that point, then the 150 pound man cannot prevent the further tipping over, he has no more weight to exert; he is used up. If a man was not able, or didn't exert his full weight before this point was reached, then the machine continues to tip over. [Tr. Vol. II, p. 189, lines 21-25; p. 190, lines 1-5.]

The defendants made certain express warranties in advertising material. In Plaintiffs' Exhibit 6, among other things, it was stated

> "Aeroil Portable Equipment for the Modern Roofer, Aeroil Mulkey Commercial All-Steel Portable Elevator, Look at these Mulkey Features, Balanced and Portable, One man can handle and operate, Eliminates Back-Breaking Labor Fatigue, 24 ft. elevator will accommodate 1—8 ft. extension, height 22 ft., undercarriage moves forward for proper balance."

Then, in Plaintiffs Exhibit 1 it is stated

> "The Mulkey Commercial All-Steel Portable Elevator It's Balanced! Only Mulkey offers you all these features, they perform with amazing speed, Nationally advertised. Nationally accepted, Fully Guaranteed! It is truly the contractor's greatest friend and labor saver. 3 special features of the Mulkey Elevator, Easily Maneuvered, New improved winch assembly easily raises elevator with extensions, Balanced undercarriage. Adjustable to accommodate extensions, balancing permits 1 man to handle and operate! (points to picture with elevator in raised position)."

Throughout the Exhibits 1 through 6 are pictures of the machine in operation in a raised position with one man

handling and operating the machine. In plaintiffs Exhibit 1 there is a picture which states: "This Mulkey is rapidly raising heavy loads of gravel to a 22 foot high rooftop" and over the picture it states: "Mulkey has proved itself." The height of the rooftop that was being loaded by Mr. Young was between 17 to 18 feet. [Tr. Vol. II, p. 71, lines 12-25.] The defendants made these warranties without any tests or investigation to determine the truth of them at all. [Tr. Vol. II, p. 83, line 22, to p. 84, line 17.]

The deceased, Herbert Weldon Young, and the other workmen who used the machine were given Plaintiffs' Exhibits 1 through 6 to rely on as to the handling and operation of the machine. [Tr. Vol II, p. 53, lines 18-21; p. 54, lines 2-6; p. 130, lines 4-25; p. 131, lines 1-2; p. 136, lines 5-18, p. 140, lines 4-9.] Herbert Weldon Young was justified in relying on the advertising statements made by the defendants.

Specification of Error.

I.

The District Court erred in giving judgment for defendants.

II.

The District Court erred in concluding, as a matter of law, the notice of breach of the express warranty is required as a condition precedent to plaintiff's recovery. The District Court erred in not applying the tort rule in this respect.

III.

The District Court erred in concluding that privity of contract of sale of the conveyor between Herbert Weldon Young and the defendants was required for plaintiff's recovery.

IV.

The District Court erred in concluding from the evidence that the plaintiffs as a matter of law did not prove a cause of action against defendants.

V.

The District Court erred as a matter of law that plaintiffs were required to prove a cause of action for either warranty, or negligence, or deceit for the reason that the plaintiff's cause of action is one cause of action under the law which the plaintiffs proved.

VI.

The District Court erred in concluding as a matter of law there were no express warranties.

VII.

The District Court erred as a matter of law in concluding that implied warranties are not available to plaintiffs as a grounds for recovery.

VIII.

The District Court erred in not finding that Herbert Weldon Young relied on the express warranties made by the defendants concerning the conveyor. The court made no finding on this matter. It was made an issue of the case as a part of the pre-trial order. [Tr. Vol. I, p. 30, lines 3-7.]

IX.

The District Court erred in not awarding damages to the plaintiffs in the sum prayed for in the complaint.

X.

The District Court erred in finding "that the booklet designated 'Aeroil Products Company, Inc., Catalogue of Roofer's Equipment' plaintiffs Exhibit 6, did not enter into or become part of the contract of sale of the con-

veyor to H. L. Weigert" for the reason that this is not supported by the evidence and is an erroneous conclusion of law because it is advertising material and as a matter of law is a part of the contract of sale.

XI.

The District Court erred in finding "that H. L. Weigert did not rely on any express warranty contained in said booklet in the purchase of said conveyor, nor were any of these express warranties any inducement to the sale of said conveyor" for the reason that this is not supported by the evidence.

XII.

The District Court erred in finding "That the brochure designated 'the Mulkey Commercial All-Steel Portable Elevator, Its Balanced' Plaintiffs Exhibit 1, did not enter into or become part of the contract of sale of the conveyor to H. L. Weigert" for the reason that this is not supported by the evidence and is an erroneous conclusion of law.

XIII.

The District Court erred in finding "That H. L. Weigert did not rely on any express warranty contained in said brochure in the purchase of said conveyor, nor were any warranties contained in said brochure any inducement to the sale of said conveyor" for the reason that this is not supported by the evidence.

XIV.

The District Court erred in finding "That said brochure or booklet or either of them did not constitute any warranties to said Herbert Weldon Young" for the reason that this is not supported by the evidence and is an erroneous conclusion of law from the evidence.

XV.

The District Court erred in finding "That no express warranties were made by Aeroil Products in the sale of the said conveyor" for the reason that this is not supported by the evidence and is an erroneous conclusion of law from the evidence.

XVI.

The District Court erred in finding "That at the time the conveyor was delivered and accepted by H. L. Weigert said conveyor was free from any defects and that said conveyor at the time of the sale and delivery of the conveyor to H. L. Weigert was of merchantable quality" for the reason that this is not supported by the evidence and is an erroneous conclusion of law from the evidence.

XVII.

The District Court erred in finding that "None of the implied warranties contained in the sale of the conveyor of H. L. Weigert ran to Herbert Weldon Young", for the reason that this is an erroneous conclusion of law.

XVIII.

The District Court erred in finding "that said conveyor was not negligently designed or constructed" for the reason that this is not supported by the evidence.

XIX.

The District Court erred in finding

> "That there were no latent defects in said conveyor, and that said conveyor was not inherently defective in design or construction, and that said conveyor was not dangerous to life and limb of a possible user"

for the reason that this is not supported by the evidence.

XX.

The District Court erred in finding

"That no inspection of said conveyor required to be made by Deryl S. Yundt or Aeroil Products, Inc. as assembler and distributor of said conveyor would disclose any defect in the conveyor.

"That Deryl S. Yundt or Aeroil Products or Structural Materials or any of them did not negligently test or inspect said conveyor after assembling it and before selling it to H. L. Weigert, and no negligence on the part of the aforesaid defendants or any of them proximately caused or contributed to the death of Herbert Weldon Young."

XXI.

The District Court erred in finding "That Aeroil Products, as assembler and distributor of said conveyor, had no duty to test said conveyor for defects in design or construction" for the reason that under the evidence of this case this is an erroneous conclusion of law.

XXII.

The District Court erred in finding "That no negligent misrepresentations were made by Aeroil Products in regard to said conveyor" for the reason that this is not supported by the evidence.

XXIII.

The District Court erred in finding "That no representations or misrepresentations were made by Aeroil Products with intent to induce H. L. Weigert to purchase said conveyor" for the reason that this is not supported by the evidence.

XXIV.

The District Court erred in finding "That H. L. Weigert at no time relied on any representations or misrep-

resentations made by Deryl S. Yundt, or Structural Materials, or Aeroil Products, or any of them, in the purchase of said conveyor" for the reason that this is not supported by the evidence.

XXV.

The District Court erred in finding "That any representations made by Aeroil Products, Inc. in regard to said conveyor were true" for the reason that this is not supported by the evidence.

XXVI.

The District Court erred in finding

> "That the presence of said undercarriage, or riser, and lowering of the hitch created a hazard of overbalancing said conveyor when lifting the hitch end of said conveyor high enough to cause said conveyor to be moved"

for the reason that this is not supported by the evidence.

XXVII.

The District Court erred in finding

> "That prior to the accident, Herbert Weldon Young was aware of the changes, repairs, and toppling of the conveyor and voluntarily and knowingly assumed any and all risk incident to the operation of said conveyor after having been changed and repaired, and that Herbert Weldon Young was negligent in his use of said conveyor on March 3, 1954, and said negligence was a proximate cause of his death, and that at the time of the accident, Herbert Weldon Young did not use, operate and move said conveyor in a manner instructed for the use of said conveyor and that Herbert Weldon Young was negligent"

for there is no evidence to support these findings.

Summary.

The defendants made certain warranties by means of advertisements that were distributed to the general public. The representations were obviously intended to influence and be relied on by any person interested. The California courts have held in *Burr v. Sherwin Williams Co.*, 42 Cal. 2d 682, 268 P. 2d 1041, that representations made by a seller in advertising material relied on by the user create strict liability on the seller for misrepresentations without privity of contract. The reason for this is that the seller, by sending the statements out as advertisements to many people, went beyond the personal contract with the buyer and induced persons other than the buyer to rely on seller's false statements which in the present case caused the death of Herbert Weldon Young who was the father to some of the plaintiffs and the husband of Mildred Marie Young. [Tr. of Record on Appeal, Vol. II, p. 53, lines 16-21; p. 54, lines 2-6; p. 18, lines 18-25; p. 19, lines 1-6; p. 27, lines 1-8; p. 130, lines 4-25; p. 131, lines 1-5; p. 136, lines 5-18; p. 140, lines 4-19; p. 173, lines 19-22; p. 196, lines 6-24; p. 23, lines 22-25; p. 24, lines 1-25; p. 25, lines 1-22; p. 75, lines 10-25; p. 76, lines 1-17; Vol. I p. 26, lines 6-20; p. 25, lines 3-7; p. 23, lines 13-20.]

ARGUMENT.

I.

The Court Erred in Giving Judgment for Defendants by Concluding From the Evidence That the Plaintiffs as a Matter of Law Did Not Prove a Cause of Action Against Defendants and That as a Matter of Law the Plaintiffs Were Required to Prove a Cause of Action for Either Warranty, or Negligence, or Deceit Because It Is One Cause of Action Being a Hybrid of Contract and Tort, and in Concluding as a Matter of Law There Were No Express Warranties and in Concluding That the Implied Warranties Were Not Available to Plaintiffs and in Concluding That Privity of Contract of Sale Was Required Between Herbert Weldon Young and the Defendants.

The facts in this case present somewhat of an unusual cause of action. It is a combination of contract law and tort law and has been referred to by Prosser "Law of Torts, 2nd Ed. Pg. 493" as "The seller's warranty is a curious hybrid of tort and contract, unique in the law."

The general rule is that between a buyer and seller privity of contract is required on a breach of warranty. This contemplates the warranty was made by the seller only to the buyer. However, where the seller publishes his warranty to all who may see it by advertisements, the warranty is made to the user of the product who relies on it and the traditional idea of privity of contract does not apply. The warranty is no longer tied to the sale but it is spread to anyone who will receive it and rely on it. This is also supported by *Gagne v. Bertran,* 43 Cal. 2d 481, 275 P. 2d 15; and *Free v. Sluss,* 87 Cal. App. 2d Supp. 933, 197 P. 2d 854. When a seller spreads

his warranty to all who will see it and rely on it, he assumes a strict liability for innocent misrepresentations of fact that he purports to know and that the recipient relies upon to his damage. The case of *Sheward v. Virtue,* 20 Cal. 2d 410, 126 P. 2d 345, is another California case that recognizes this strict liability.

> "The Courts of this state (California) are committed to the doctrine that the duty of care exists in absence of privity of contract not only where the article manufactured is inherently dangerous, but also where it is reasonably certain, if negligently manufactured or constructed, to place life and limb in peril."

A portable elevator is a machine which if negligently constructed is reasonably certain to place life and limb in peril. [Tr. Vol. II, p. 59, line 6, to p. 61, line 5.] In the present case, Aeroil Products Company assembled and sold a portable elevator [Tr. Vol. I, p. 25, lines 3-7; p. 26, lines 16-20] which was negligently designed and constructed [Tr. Vol. II, p. 173, lines 19-22; p. 196, lines 14-24] so that the head of Herbert Weldon Young was crushed. [Pltf. Exs. 7-13.] Aeroil warranted through advertisements [Pltf. Exs. 1-6] that the elevator could be handled by one man and that it was balanced and portable. One man was handling the machine and it killed him. [Tr. Vol. II, p. 59, lines 7-19.] The articulate member of the undercarriage toward the normally upper end of the conveyor was not constrained against motion toward the normally lower end of the conveyor except insofar as the weight of the conveyor resting upon it. When the normally upper end of the conveyor hit the ground, the articulate members of the undercarriage were not constrained against motion toward

the normally lower end (but then the upper end) and because of the energy in the system of the machine caused by the tipping over of the machine the undercarriage collapsed as observed in the accident. [Tr. Vol. II, p. 173, line 24, to p. 197, line 12.] The tipping of the normally upper end of the conveyor so that it was down and the normally lower end was up did not injure Mr. Young. This would not have hurt him. It was the collapsing of the undercarriage that killed him. The plates or "riser" on the normally lower end of the machine had nothing to do with the collapse of the undercarriage. [Tr. Vol. II, p. 196, lines 14-24.] The warranty of the assembler and seller of the machine is unqualified that "It's Balanced!", "Balanced and Portable", "One man can handle and operate", "Easily Maneuvered", "Balanced Undercarriage", "Balancing permits one man to handle and operate". However, when the upper end is at a height of 20 feet and then the lower end of the machine is raised a vertical distance of 5 feet 5 inches, it will just balance with a man of 150 pounds weight holding on to it and exerting his full weight. If it goes beyond that point, then the 150 pound man cannot prevent the further tipping over, he has no more weight to exert; he is used up. If a man was not able, or didn't exert his full weight before this point was reached, then the machine continues to tip over. [Tr. Vol. II, p. 189, lines 21-25; p. 190, lines 1-5.] Mr. Young was 5 feet 10 inches tall. [Tr. Vol. II, p. 65, lines 17-18.] Therefore, to hold it, to keep it from tipping over, to prevent it from getting above the head of the handler, there is more weight needed than one man has. The representation and warranty was false. Aeroil Products Company made these warranties and representations without any tests or investigation to de-

termine the truth of them at all. [Tr. Vol. II, p. 83, line 22, to p. 84, line 17.] When the conveyor tipped over, the undercarriage was not balanced, it collapsed. The machine was, therefore, not balanced so as to hold together when the normally upper end came in contact with the ground. And, of course, in this position it was not portable. [Tr. Vol. II, p. 12, lines 9-14.]

Structural Material Company was involved in the sale and in the warranties through Deryl S. Yundt who was manager of Aeroil. [Tr. Vol. I, p. 25, lines 7-22.]

Aeroil Products Company assembled the portable elevator [Tr. Vol. I, p. 25, lines 3 and 4] and made numerous express warranties or representations in advertising material [Tr. Exs. 1-6] that were sent out to the public [Tr. Vol. II, p. 75, line 10, to p. 76, line 9] and delivered along with the machine. [Tr. Vol. II, p. 80, lines 3-7.] Aeroil gave its name to the portable elevator by advertising the machine as the "Aeroil Mulkey Commercial All-Steel Portable Elevator". [Pltf. Ex. 6.] Some of the express representations in the advertising material states "Balanced undercarriage . . . balancing permits 1 man to handle and operate!" and points to a picture showing the elevator in a raised position. [Pltf. Ex. 1.] Also, the advertisement states "Undercarriage moves forward for proper balance." This advertising material was shown to Herbert Weldon Young, deceased. [Tr. Vol. II, p. 15, lines 17-25; p. 16, lines 1-13; p. 18, lines 12-25; p. 19, lines 1-6.] On the day of the accident, he was in the process of moving the portable elevator away from the roof of a house and the undercarriage collapsed and crushed his head. He was moving the machine no differently than it was always moved. [Tr. Vol. II, p. 25, lines 1-14.]

The general rule is that privity of contract is required in an action for the breach of an express or implied warranty. However, there are two exceptions to this rule recognized by California law, to-wit:

(a) No requirement of privity of contract in cases involving foodstuffs.

(b) No requirement of privity of contract in cases where the person using the product relied on representations made by the seller in advertising material. Recovery was allowed on the theory of express warranty.

The above principles and supporting cases are found in *Burr v. Sherwin Williams Co.,* 42 Cal. 2d 682, 268 P. 2d 1041. The opinion was written by Chief Justice Gibson of the California Supreme Court.

In the California Supreme Court opinion written by Justice Traynor, found in *Gagne v. Bertran,* 43 Cal. 2d 481, 275 P. 2d 15, it is stated:

> "Strict liability has also been imposed for innocent misrepresentations of facts that the maker purported to know, that the recipient relied on to his damage and that the maker positively affirmed under circumstances that justify the conclusion that he assumed responsibility for their accuracy."

It is further pointed out in the same opinion that the seller is "presumed" to know the truth (*Edwards v. Sergi,* 137 Cal. App. 369, 30 P. 2d 541) and that the representation need not be made with knowledge of actual falsity, but need only be an "assertion, as a fact, of that which is not true, by one who has no reasonable ground for believing it to be true." (Civ. Code, Sec. 1710.) The intent required by this section is nothing more than an

intent to "induce action" and an "intent to deceive" is not required. The Court further pointed out that the measure of damages in such a case is the actual loss suffered because of the misrepresentation. Finally, the Court concluded that if plaintiff alleged and proved facts that justify the application of the above principles the labeling of the cause of action is immaterial.

The seller cannot say that the deceased was negligent in relying on his warranty. If seller could do this he would be hiding behind his own wrong. The test is whether or not considering the experience, education and intelligence of the deceased, whether or not it could be concluded that he was justified in relying on the warranty. Seller warranted that one man could handle the machine. Herbert Weldon Young was justified in relying on this warranty. The design and construction defect was hidden and not known to him. [Tr. Vol. II, p. 51, lines 1-12.] He was justified in relying on seller's statement that one man could handle the elevator. He was justified in believing, therefore, that if he handled the machine it was safe for him to do so and under the circumstances any workman would have so believed. [Tr. Vol. II, p. 60, line 23, to p. 61, line 4.] (Prosser Law of Torts, 2nd Ed., p. 493.)

The California Courts have applied the tort rule in this type of case to survival of actions, the statute of limitations, the liberal tort rule as to damages, and have allowed recovery for wrongful death. (*Gosling v. Nichols,* 59 Cal. App. 2d 442, 139 P. 2d 86; *Rubino v. Utah Canning Co.,* 123 Cal. App. 2d 18, 266 P. 2d 163; *Greco v. S. S. Kresge Co.,* 277 N. Y. 26, 12 N. E. 2d 557, 115 A. L. R. 1020.)

Notice is not required to be given as a condition precedent to the commencement of a tort action. In this case the user of the seller's product was killed. He could not give notice. However, in this case actual notice was given by the deceased's employer immediately after the accident occurred. [Tr. Vol. II, p. 82, line 4, to p. 83, line 2; p. 135, lines 4-24.] There is no requirement in law under the rules of tort actions to require the wife or minor children of the deceased to give notice. (*Rubino v. Utah Canning Co.,* 123 Cal. App. 2d 18, 266 P. 2d 163.) The gravamen of a cause of action for breach of an express warranty where the user of the product relied on representations made by the seller in advertising material which results in death or injury "sounds in tort." The cause of action is not *ex contractu.* (*Gosling v. Nichols,* 55 Cal. App. 2d 442, 139 P. 2d 86.)

The trial court made no finding of fact on reliance by Herbert Weldon Young on the express warranties contained in the advertising material. The Court seemed to only look at it as to whether the employer of the deceased relied on the expressed warranties. The employer testified he did rely on the express warranties. [Tr. Vol. II, p. 151, lines 2-9; p. 136, lines 5-18.] However, what the employer relied on is not the question. The reliance that is probative is the reliance of the deceased employee. This is proved by his having read the warranties and he was using the machine as warranted. ("One man can handle and operate.") [Pltf. Ex. 6; Tr. Vol. II, p. 53, lines 16-21; p. 19, lines 3-6; p. 54, lines 2-6.] It is also proved by the reliance of the other workman who moved it, to-wit: Mr. Thomas. [Tr. Vol. II, p. 54, lines 2-6.] The defect was hidden. None of the workmen or the employer knew of it. [Tr. Vol. II, p. 51, lines

1-12; p. 40, lines 11-17.] The deceased cannot be produced to testify. Therefore, we submit that reliance of the deceased was proved. He was justified in relying on the express warranties. There was no negligence on the part of the deceased in relying on the express warranties. To permit the defendants to be held blameless because the deceased relied on their warranty would be permitting the defendants to hide behind their own wrong.

The case of *MacPherson v. Buick Motor Co.*, 217 N. Y. 382, 111 N. E. 1050, did not go beyond the ultimate purchaser himself. However, the later cases have extended strict liability to the purchaser's employees. (*Kalash v. Los Angeles Ladder Co.*, 1 Cal. 2d 229, 34 P. 2d 481.)

It is now generally recognized that a manufacturer and a dealer has a responsibility to the ultimate consumer, based upon nothing more than the sufficient fact that he has so dealt with the goods that they are likely to come into the hands of another, and to do harm if they are defective. (Prosser on Torts, 2nd Ed., p. 498, Note 9.)

> "The battle over liability for negligence has been fought and won by plaintiff, both in England and in the United States, and the scene of combat is now being shifted to the question of strict liability, on the basis of some form of implied warranty where there is no contract."

This brings me to a discussion of the applicability of implied warranty to this case. The California cases, *Temeroli v. Austin Trailer Equipment Co.*, 102 Cal. App. 2d 464, 227 P. 2d 923 (Uniform Sales Act, Sec. 1735, Sub. 1, Civ. Code of Calif.), held that under the Uniform

Sales Act, the implied warranty of fitness for the purpose for which it was purchased extends to latent defects which the seller had no knowledge of. This case further points out that even though the seller could not have discovered the latent defect by inspection that any hardship on the seller is alleviated by the fact that the seller may recover from the manufacturer any damages recovered from the seller by the ultimate user. In the case before the Court, the user was the employee of the buyer and was a class of person who the seller knew would be using the machine, therefore, the implied warranty of fitness runs to the employee as much as it does to the buyer because the employee in this case was using the machine for his employer. The seller knew the buyer's employee would use the machine and it was the very purpose of the machine's existence to be used by the buyer's laborers. [Ex. 1.] Therefore, the plaintiffs are entitled to rely on an implied warranty that there were no latent or hidden defects in the machine due to negligent design and construction that would cause damage to the employee of the buyer who was one of the class of persons seller intended the machine to be used by. We have in this case, both express warranties and implied warranty. Either will support plaintiffs right to recover.

I wish to further point out that the tort elements of the warranty include both rules of negligence and rules of deceit. The case of *Gange v. Bertran* (*supra*) points this out. "The positive assertion in a manner not warranted by the information of the person making it, of that which is not true, though he believes it to be true" is a negligent misrepresentation. (Cal. Civ. Code, Sec. 1572, Sub. 2.) As I have heretofore pointed out, knowledge by the seller of actual falsity of the statement is

not necessary. The reason for this is that in modern trade a seller owes a duty to the users of his product to make warranties about his product only after the seller knows they are true. In the present case, Aeroil made the warranties without any investigation to see if they were true. [Tr. Vol. II, p. 83, line 22, to p. 84, line 17.] By making these warranties the deceased was caused to rely on them and he was killed. In our society we of necessity must rely on the warranties of the seller. The products placed on the American market are highly specialized and we as consumers can expect that the seller will make warranties only after he knows they are true. Otherwise, each and every one of us would be in mortal peril every minute of the day. The California Courts have recognized the fact that a type of action like the one at issue is important to our society for the reason that each of us are confronted every minute of our lives by machines and gadgets that if they are negligently designed and constructed will place us in peril of life and limb. (*Escola v. Coca-Cola Bottling Co. of Fresno,* 24 Cal. 2d 453, 150 P. 2d 436.) And particularly when a seller makes an express warranty about his machine he assumes strict liability for the truth of the warranty and owes a duty to everyone who relies upon it that the person relying upon it will not thereby be placed in danger of life and limb. (*Lane v. Swanson & Sons,* 130 Cal. App. 2d 210, 278 P. 2d 723.)

What is an express warranty? This is discussed in the "boned chicken" case, to-wit: *Lane v. C. A. Swanson & Sons,* 130 Cal. App. 2d 210, 278 P. 2d 723. There the Court says:

> "Any affirmation of fact or any promise by the seller relating to the goods is an express warranty

> if the natural tendency of such affirmation or promise is to induce the buyer to purchase the goods." (Civ. Code, Section 1732; *Scott v. Johnson,* 36 Cal. 2d 864, 869-870, 229 P. 2d 348, 28 A. L. R. 2d 580.)

The Court further points out, in the case of *Lane v. C. A. Swanson & Sons* (*supra*), that the tendency of the modern cases is to construe liberally in favor of the user of the product the language used by the seller in making affirmations respecting his goods in advertising material and to enlarge the responsibility of the seller to construe every affirmation by him to be a warranty when such construction is at all reasonable. The Court further pointed out that representations in advertisements may be considered as a part of the contract of sale. In this case the retailer was held responsible for damages resulting from a piece of bone in chicken that was advertised as "boned".

The defendant, Aeroil Products Company, owed the duty to the person who relied on the express affirmation of fact made about the machine to determine the truth of the statements. The defendant, Aeroil Products Company, gave its reputation to the statements. A seller-assembler of the machine is under the duty to investigate to determine the truth of the express warranties. The one who suffers injury from a defective product is unprepared to meet its consequences. The cost of the injury and the loss of time, life or health may be an overwhelming misfortune, as in this case, to the family of the workman and a needless one for the risk of in-

jury from reliance on false advertising affirmations of fact can be prevented by the seller-assembler making the advertising statement, only if he is sure of their truth after tests and investigation. It is to the public interest to discourage the marketing of products having defects that are a menace to the public. If such products nevertheless find their way into the market and are sold by advertising statements that are untrue resulting from failure to test and investigate, it is to the public interest to place the responsibility for whatever injury they may cause upon the person making the false advertising statement. [Pltf. Ex. 6.] In this case, this machine was not safe for one man to handle. By stating that one man can handle the machine it is an affirmation of fact that one man can safely do so. Also, it is stated the machine is balanced. When a machine is said to be balanced, one would conclude that it is safe. The machine, when raised as in this case, was not balanced when the normally upper end hit the ground because then the undercarriage would collapse. It makes no difference how intermittently such injuries may occur or how haphazardly they may strike, the risk of their occurrence is a constant risk and a general one. (*Escola v. Coca-Cola Bottling Co. of Fresno,* 24 Cal. 453, 150 P. 2d 436.) (Justice Traynor concurring opinion.) Aeroil Products Company in their catalog No. 418 Y state:

> "Aeroil Portable Equipment for the Modern Roofer. Aeroil Mulkey Commercial All-Steel Portable Elevator. Look at these Mulkey Features. Balanced and Portable, One Man can Handle and Oper-

ate, Eliminates Back-Breaking Labor Fatigue, 24 ft. elevator will accommodate 1—8 ft. extension, height 22 ft. undercarriage moves forward for proper balance."

In this case the upper end of the elevator was at a height of 20 feet. [Tr. Vol. II, p. 71, lines 12-25; p. 23, lines 1-3.] When it tipped over on a level paved street and the upper end hit the ground, the undercarriage collapsed because of a defect in construction and design as testified to by Dr. Wood. The defendants put on no evidence. They presented no expert to contradict Dr. Wood. This machine was inherently dangerous and created a constant risk to any person using it. The defendant, Aeroil, made no tests to determine the truth of the statements made by them. This is a negligent misrepresentation which public policy requires the defendants be held responsible for.

California Code of Civil Procedure provides in Section 1963 that there is a disputable presumption that a person takes ordinary care of his own concern. Mr. Young, therefore, is presumed to have been careful and not negligent. It is up to the defendant to rebut this presumption. As pointed out heretofore the witnesses said Mr. Young did nothing in the handling of the machine other than was customarily done. The defendants did not rebut the presumption of due care that Mr. Young is clothed in.

II.

The Court Erred in Not Awarding Damages to the Plaintiffs in the Sum Prayed for in the Complaint.

Herbert Weldon Young was earning net take home pay of $306.70 per month. [Tr. Vol. I, p. 27, lines 3-6.] Mr. Young was 29 years of age at his death. His life expectancy was 38 years, 223 days. The ages of all the plaintiffs are younger than the deceased. Their life expectancy would be greater. [Tr. Vol. II, p. 247, lines 16-20.] The defendants stipulated that the deceased was a kind and loving husband and father to his wife and children. [Tr. Vol. II, p. 245, lines 23-25.] The funeral expense of the deceased was $1200. [Tr. Vol. I, p. 27, lines 7-8.] One of the plaintiffs, Danny Lee Young, is an invalid requiring constant medical attention. [Tr. Vol. II, p. 251, lines 2-12; p. 252, lines 13-16; p. 253, lines 4-7.] The expected earnings of deceased net if his life had not been cut short is $140,000. The plaintiffs are entitled to damages in this type of case in the loss arising from a deprivation of benefits which, from all the circumstances of the case, it could be reasonably expected each of the plaintiffs would have received from the deceased had his life not been taken. This includes the pecuniary value of loss of society, comfort, protection nurture, and education and support and the reasonable expectation of pecuniary advantage to each plaintiff from the continuance of the life of the deceased. Another element is the damage suffered by each plaintiff by the death, is the future financial assistance each plaintiff might reasonably expect from a continuance of the life of the deceased.

In this case one of the children is an invalid. The fact that Danny Lee Young could expect financial support during the child's entire life is an element of fact that is to be compensated for. This child can never be expected to earn his own living and needs constant medical attention which his father was furnishing and which he could have expected during his life, limited only by the father's life expectancy. (*Blackwell v. American Film Co.,* 189 Cal. 689, 209 Pac. 999; *Ure v. Maggio Bros. Co.,* 24 Cal. App. 2d 490, 75 P. 2d 534; *Simoneau v. Pacific Electric Ry. Co.,* 116 Cal. 265, 136 Pac. 544.)

III.

The Findings of Fact by the Trial Court Are Not Supported by the Evidence as Specified in the Specification of Error. [Tr. Vol. I, pp. 54-58.]

H. L. Weigert did rely on the express warranties contained in Plaintiff's Exhibits 1 through 6 in the purchase of the conveyor and these express warranties were an inducement to the sale of the conveyor. [Tr. Vol. II, p. 151, lines 2-9; p. 130, lines 4-25; p. 131, lines 1-2; p. 136, lines 5-18; p. 140, lines 4-9; p. 142, lines 16-25; p. 143, lines 1-2.] As a matter of law the California Courts have held that representations in advertisements are to be considered as a part of the contract of sale. (*Lane v. C. A. Swanson & Sons,* 130 Cal. App. 2d 210, 278 P. 2d 723.)

The brochures or booklets and each of them [Pltf. Exs. 1-6, incl.] do constitute warranties to Herbert Weldon Young. He was the employee of the purchaser. The

machine was intended to be used by the employee. The case of *Kalash v. Los Angeles Ladder Co.,* 1 Cal. 2d 229, 34 P. 2d 481, establishes the duty of the seller to the purchaser's employee.

Aeroil Products Company, Inc., did make express warranties in the sale of the conveyor. Plaintiff's Exhibits 1 through 6 were delivered to H. L. Weigert, the deceased's employer, at the time of the delivery and sale of the machine. [Tr. Vol. I, p. 38, lines 16-25; p. 39, lines 1-3; p. 26, lines 6-20.] Mr. Yundt who was manager of Aeroil Products Company, Inc., only made statements to Weigert about the machine from the advertising material. [Pltf. Exs. 1-6; Tr. Vol. II, p. 80, lines 3-7.]

At the time the conveyor was delivered and accepted by H. L. Weigert, the conveyor was not free from any defects and the conveyor at the time of the sale and delivery of the conveyor to H. L. Weigert was not of merchantable quality. All one needs do is read Dr. Wood's uncontradicted testimony concerning the conveyor and then ask yourself if you would risk your life by using the machine. I am sure you would stay away from the machine, because it is a death trap. The defect is in design and construction. [Tr. Vol. II, p. 171, line 21, to p. 173, line 21; p. 196, lines 6-25; p. 197, lines 1-12.] The conveyor was negligently designed and constructed. There is no evidence to the contrary. The defect is latent. It cannot be seen by the eye and the workmen using the machine did not know of it. [Tr. Vol. II, p. 51, lines 1-12; p. 140, lines 11-17.]

Aeroil Products Company, Inc., as assembler and distributor of the conveyor had a duty to test the conveyer for defects in design or construction. (*Escola v. Coca-Cola Bottling Co. of Fresno,* 24 Cal. 2d 453, 150 P. 2d 436.) Aeroil Products made negligent misrepresentations in regard to the conveyor. Aeroil Products Company handed out all of the advertising in California. The Sam Mulkey Company was never in California at any time. [Tr. Vol. I, p. 22.] All of the statements in Plaintiff's Exhibits 1 through 6 were sent out to the public by Aeroil Products and were intended to induce the purchase of the conveyor. H. L. Weigert testified that he relied on the representations. [Tr. Vol. II, p. 136, lines 5-18; p. 140, lines 4-9.]

The representations in the advertising material made by Aeroil Products in regard to the conveyor were not true. [Tr. Vol. II, p. 173, lines 19-21; p. 196, lines 6-24.]

There is no evidence to support the finding

> "that the presence of said undercarriage or riser and lowering of the hitch created a hazard of overbalancing said conveyor when lifting the hitch end of said conveyor high enough to cause said conveyor to be moved."

The changing of the normally lower end to be the upper end of the conveyor did not kill Mr. Young. It was the collapse of the undercarriage due to the fact of its defect in design and construction. The undercarriage was not balanced when the normally upper end see-sawed

over to become the lower end. The collapse of the undercarriage had nothing to do with the "riser" or the lowering of the hitch. [Tr. Vol. II, p. 196, lines 6-24.]

Herbert Weldon Young was in no way negligent. He moved the conveyor no differently than before or as others had moved it. The defect was there and an ever constant danger. He had no warning and no knowledge of it. The collapse of the undercarriage occurred with great speed. He was killed within three or four seconds. [Tr. Vol. II, p. 24, lines 16-18.]

Respectfully submitted,

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